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IN THE

Supreme Court of the United States

MICHAEL LYNCH, AN INDIVIDUAL, PETITIONER

v.

TRENDWEST RESORTS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the decision below conflict with the decisions of this Court which recognize the power of the federal courts to grant a new trial where the respondent has deliberately refused in discovery to disclose relevant evidence of liability and damages for its copyright infringement and then destroyed this relevant evidence so that it can never be discovered?

2. Was the petitioner denied the process due him under the fifth amendment to the federal constitution when after learning that the respondent had willfully refused to disclose and then destroyed relevant evidence of copyright infringement during the course of discovery, he was denied the opportunity to present to a jury these new instances of copyright infringement and thereby denied a hearing on the true dimensions of the respondent's liability and the measure which should properly attend a jury's calculation of damages?

3. Does the lower courts' misapplication of the standards under either its inherent power or Fed. R. App. P. 60(b)(3) for vacating a judgment and ordering a new trial because of a party's misconduct in discovery invoke this Court's duty of superintendence of the federal judiciary?

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The unpublished opinion of the Court of Appeals for the Ninth Circuit in *Michael Lynch v. Trendwest Resorts, Inc.*(C.A. No. 04-35467), decided and filed June 16, 2006, affirming the District Court's denial of the petitioner's motion for a new trial, is set forth in the Appendix hereto(App. 1-2).

The unpublished Order of the United States District Court for the Western District of Washington at Seattle, in *Michael Lynch v. Trendwest Resorts, Inc.*(Civil Action C00-329P), dated April 30, 2004, denying the petitioner's motion for a new trial, is set forth in the Appendix hereto(App. 3-13).

The unpublished order of the Court of Appeals for the Ninth Circuit in *Michael Lynch v. Trendwest Resorts, Inc.*(C.A. No. 04-35467), dated and filed July 28, 2006, denying the petitioners' timely filed petition for rehearing and/or for rehearing *en banc*, is set forth in the Appendix hereto(App. 14).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit affirming the District Court's order denying the petitioner's motion for a new trial was entered on June 16, 2006; and its order denying the petitioner's timely filed petition for rehearing and/or for rehearing *en banc* was decided and filed on July 28, 2006(App.1-2;14).

This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals'

denial of the petitioners' timely filed petition for rehearing and/or for rehearing *en banc*. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

Fed. R. Civ. P. 60(b)(3):

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
...(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party....

15 U.S.C. Section 106(1), (3) and (4):

Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of the copyright under this title has the exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
....
(3) to distribute copies or phonorecords of the

copy-
righted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly....

15 U.S.C. Section 504 (a)(1) and (b):

Remedies for infringement: Damages and profits

(a) In General.—Except as otherwise provided in this rule, an infringer of copyright is liable for either—
(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b)....
(b) Actual Damages and Profits.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into
account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

STATEMENT

In March of 2000, the petitioner Michael Lynch ("the petitioner") brought this civil action against the respondent Trendwest Resorts, Inc. ("Trendwest") in the federal district court for the Western District of Washington seeking injunctive relief and damages arising from Trendwest's alleged copyright infringement, unfair competition and violation of the Washington Consumer Protection Act in connection with its use of the petitioner's videotapes to market and sell so-called "credits" or interests in time share condominiums. The petitioner is an independent video producer who created original, proprietary and copyright-registered videotapes of various resort properties which possess unique and highly artistic value for use in the time share industry, e.g., the Kona Coast Resorts, the Big Island of Hawaii, Palm Spring Desert Princess, etc.

Alleging that Trendwest had intentionally copied substantial portions of his videotapes without his authority and then used them to market and sell credits or interests in time share condominiums even though it was fully aware that these videotapes belonged to him, the petitioner asserted that "[t]housands of copies of the infringing tapes were exhibited to thousands of [Trendwest's] customers and potential customers and thousands of such tapes were given to [Trendwest's] customers all to aid in the sale of time share points, to reduce the number of [contract] rescissions by purchasers, to aid in the sales of added points to existing owners and to aid in referral sales."

Consistent with the remedies available to him

under the Copyright Act of 1976, the petitioner sought *inter alia* an injunction prohibiting any further infringement by Trendwest, the impoundment of all of his videotapes, and an award of damages as measured by his lost profits caused by Trendwest's misappropriation. In addition, the petitioner sought an accounting and disgorgement of Trendwest's increased share of time-share sales profits which were attributable to Trendwest's infringing exploitation of the petitioner's unique, vacation-themed videotapes as its primary sales tool.

According to 17 U.S.C. Section 504(b), the petitioner was entitled to

> recover the actual damages suffered by him...as result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.
> In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

The petitioner alleged that Trendwest's direct and indirect profits from its infringement of his videotapes in the marketing and sale of time share condominiums were in excess of $1,000,000.

Trendwest used three video presentations for the marketing and sale of its credits for time share

condominiums. The first was a so-called "loop tape" lasting 40 minutes which Trendwest used to entertain prospective customers as they sat in a lobby awaiting the sales presentation. The second was the 10-minute "podium tape" which was used in the podium room or theaters during the sales sessions. The third tape was the "take-home tape" which Trendwest gave to new members to describe the property which they had just purchased. The "take-home tape" was a combination of the "loop tape" and the "podium tape."

During the course of discovery and in order to identify with precision the nature and extent of Trendwest's infringing activity in copying his videotapes, the petitioner both in March and early October of 2000 requested from Trendwest the identification and production of every videotape it used for sales purposes for the years 1997 through 2000, requests which unambiguously encompassed the 40-minute loop tape which Trendwest used to entertain prospective customers as they sat in a lobby awaiting its sales presentation. Despite these two discovery requests by the petitioner for these loop tapes, Trendwest deliberately refused to produce such tapes and refused to acknowledge that it had ever used such a loop tape or that such a loop tape had ever existed.

On October 10, 2000, just seven months after being sued for copyright infringement based upon its unauthorized use of the petitioner's videotapes and in the wake of its repeated refusal to honor the petitioner's two requests in this lawsuit for the production of its loop tapes for 1997 through 2000, Trendwest instructed all of its sales personnel to destroy all of its loop tapes and take-home tapes(which

also contains the loop tape).

Because the petitioner was seeking as his damages not only the recovery of profits which Trendwest derived from the direct sale of the videotape containing the infringing material but also a portion of the profits which Trendwest generated using his videotapes to market and sell credits in time share condominiums, his claim for damages included Trendwest's direct profits as well as its indirect profits.

On February 5, 2001, Trendwest moved for partial summary judgment in its favor on that part of the petitioner's complaint which sought an award of Trendwest's indirect profits. It argued that Trendwest's indirect profits were too remote and speculative because there was no causal connection between its use of the petitioner's podium and take-home tapes and the profits it realized from purchasers who had been exposed to these video presentations.

The petitioner opposed the motion by pointing out that even Trendwest's own executives admitted that high quality video presentations, ones which could put the prospective purchaser "in the picture" of the resort experience, are an essential sales tool universally employed in the time-share resort industry. Moreover, he stressed that his video material which Trendwest appropriated consisted of exotic and compelling images of Trendwest's most desirable and profitable resort destinations, notably including the Hawaii and Palm Spring vacation experience.

The district court denied Trendwest's motion. It ruled that there was "at a minimum, a temporal

connection between the viewing of the podium tape, the purchase, and the receipt of the take-home tape. There is therefore a genuine issue of material fact for trial on this issue."

Weeks before the matter was set down for trial and long after discovery had closed, Trendwest renewed its motion for partial summary judgment contending once again that the petitioner's claim for the recovery of its indirect profits was too attenuated to provide a genuine issue of material fact for trial. It adduced anecdotal evidence that in 2 of its 37 sales facilities in the United States it discontinued the performance or distribution of any infringing videotape footage, i.e., the "podium" and "take home" tapes, without any apparent decrease in sales or increase in the rate of rescission of purchase agreements. The petitioner opposed the renewed motion by challenging this "new" data as statistically insignificant and legally insufficient to change the district judge's earlier legal analysis which found a genuine issue of material fact for trial on this issue of Trendwest's indirect profits.

On August 22, 2001, the district court, Pechman, J., granted Trendwest's renewed motion for partial summary judgment on this issue of indirect profits. She ruled:

> Mr. Lynch has failed to produce sufficient proof in support of his claim for indirect profits. In fact, in response to Trendwest's motion, he has produced no evidence from which a fact finder could reasonably calculate the portion of Trendwest's profits attributable to the alleged infringement. It appears that any connection is

> too conjectural or remote to calculate. As such, a "reasonable, nonspeculative formula" cannot be derived for determining the measure of recovery for indirect profits.

The petitioner's claim for damages based upon the indirect profits which Trendwest derived from his work was therefore dismissed.

The petitioner's remaining direct damage claims for copyright infringement were then tried to a jury in September of 2001. At trial, Trendwest did not dispute that it had copied several minutes of the petitioner's video footage of the resort destinations for which it sold time-share credits; but it argued that the petitioner had given it permission via an oral license to use his proprietary material. The jury disbelieved Trendwest's proof on this score and found that Trendwest's unauthorized use of the footage of four of petitioner's unspecified videotapes amounted to copyright violations.

Having had his damage claims based upon Trendwest's indirect profits dismissed, the petitioner's damage claims at trial were bottomed on the loss of his right to duplicate his tapes. Based upon his per-video charge to duplicate his 103,543 tapes, he calculated his damages at $362,401. The jury returned a verdict in his favor in the amount of $88,392.85.

Following the denial of the petitioner's post-trial motions, he appealed the pre-trial order of the district judge dismissing his claim for Trendwest's indirect profits generated by the infringing activity. In *Lynch v. Trendwest Resorts, Inc.*, 64 Fed. Appx. 44(9th Cir.

2003), the court of appeals affirmed the district judge's ruling. *Id.* The petitioner then unsuccessfully petitioned this Court for a writ of certiorari to review the court of appeals' decision. *Lynch v. Trendwest Resorts, Inc.*, 540 U.S. 877(2003).

While this appeal by the petitioner was pending, his counsel, representing another independent video producer in a similar suit against Trendwest for copyright infringement (*David M. Kalber v. Trendwest Resorts, Inc., et al.*, U.S. District Court, W.D. Wash. No. C01-1548z), discovered for the first time that besides using the petitioner's video material in both their "podium tapes" and the "take-home" tapes, Trendwest *also* had continuously presented the petitioner's proprietary video material to its potential time share purchasers in the so-called "loop tapes."

That is, at all relevant times, Trendwest continuously played the 40-minute loop tape containing the petitioner's video material in order to entertain prospective customers as they awaited Trendwest's formal sales presentation. This was precisely the video material which the petitioner sought in discovery in his own suit, material which Trendwest not only deliberately refused to produce but also then willfully destroyed while the petitioner's repeated discovery requests for this material were still outstanding.

Moreover, this same proof in the *Kalber* litigation undercut Trendwest's anecdotal proof adduced in its motion for partial summary judgment in the petitioner's suit that in 2 of its 37 sales facilities in the United States, it discontinued the performance or distribution of any infringing videotape footage, i.e., the

"podium" and "take home" tapes, without any apparent decrease in sales or increase in the rate of rescission of purchase agreements. That is, contrary to evidence showing no apparent effect of the petitioner's video material on Trendwest's sales performance in 2 sales locations, the true facts were that Trendwest had continued to display the infringing (and theretofore concealed) loop tapes containing the petitionre's video material without cease in at least 1 of the 2 supposedly"Lynch-free" offices.

The *Kalber* proof further exposed perjured testimony by Trendwest in its defense of the petitioner's copyright infringement action. Specifically, during discovery, the petitioner sought an order compelling Trendwest to produce copies of certain so-called "Perspectives" tapes, ones used by Trendwest to train its sales staff. Trendwest opposed this discovery by asserting categorically that there was no Lynch material in any "Perspectives" tapes. Yet the videotapes produced in the *Kalber* litigation show *that the Perspectives tapes do, in fact, contain substantial infringing footage belonging to the petitioner.*

Upon discovering Trendwest's deliberate, willful concealment and destruction or spoliation of relevant evidence in his case, the petitioner in July and then again in September of 2002 moved in the district court for relief from judgment pursuant to Fed. R. Civ. P. 61(b)(2), (3) and (6). His serial motions sought a new trial on his direct infringement claims so that he could recover additional direct damages from Trendwest for its discrete infringing display of the loop and Prospective tapes; he also sought relief from the summary judgment dismissal of his claim for the

indirect profits which Trendwest generated using the loop and Prospective tapes containing his video material to market and sell credits in time share condominiums.

However, because the petitioner's appeal from the district court's pre-trial dismissal of his claim for Trendwest's indirect profits was still pending, the lower court declined to rule on these motions(App. 5). Once the court of appeals affirmed the district court's dismissal on April 18, 2003, the district judge considered the petitioner's renewed motion for a new trial. In an order dated April 30, 2004, the district court, Pechman, J., denied the petitioner's motion(App. 3-13).

The petitioner claimed, among other things, that because of Trendwest's misconduct during discovery in willfully concealing and then destroying relevant, substantial evidence of its infringing activity, he was denied the opportunity to present this evidence to a jury and was thereby denied a fair measure of damages which a jury might have awarded him for these undisclosed instances of infringement. He therefore asserted that a new trial was warranted under Rule 60(b)(3) in order to let a jury decide whether he was entitled to augmented damages caused by Trendwest's use of the infringing loop and Perspectives tapes and whether he could recover as damages the indirect profits Trendwest earned by using his video material to market and sell credits in time share condominiums (App.5-9).

Judge Pechman denied the petitioner's motion(App. 5-9;13). With regard to the petitioner's

claim that a jury could augment his damages at a new trial, the district court noted that relief under this subsection of Rule 60 will be invoked where the misconduct interfered with the moving party's ability to prepare fully and fairly for trial(App. 8-9). However, the district judge concluded that the petitioner's allegations of discovery misconduct here "do not amount to clear and convincing proof that [the petitioner] obtained an unfair judgment as a result of [Trendwest's] conduct"(App. 9). She continued:

> The footage on the loop and perspectives tapes was the same footage on the take-home tapes that [the petitioner] presented to the jury. Given this fact combined with the fact that [the petitioner] recovered over $88,000, but had actually sought more, *the loop and perspectives tapes would likely have been cumulative and of marginal relevance to the damages [the petitioner] sought at trial.* As such, the Court does not conclude that [Trendwest's] misconduct in not disclosing this material substantially interfered with [the petitioner's] right to fully and fairly prepare for and present his case at trial.

(App. 9)(emphasis supplied).

The district judge then rejected the petitioner's claim that this new evidence bolstered his claim that he was entitled to a portion of the indirect profits which Trendwest earned by using his video material to market and sell credits in time share condominiums(App. 10-13). She ruled that none of this new evidence undermined Trendwest's contention

(made upon its earlier motion for partial summary judgment) that the podium and take-home tapes containing the petitioner's video material had no effect on sales(App. 11-12). Moreover, she concluded that the petitioner "has not presented any evidence that the loop tapes had an effect on sales [and its] mere use is insufficient evidence to prove this fact or even rebut [Trendwest's] evidence that the podium and take-home tapes did not affect sales"(App. 12). Accordingly,

> [g]iven the evidence that the podium and take-home tapes did not affect sales and the fact that the loop tapes contained the same footage, [the petitioner's] evidence that the loop tapes were used in sales' offices does not make [the petitioner's] claim to indirect profits any less speculative than when the Court considered this issue on summary judgment.

(App. 12-13).

The petitioner appealed this decision by Judge Pechman to the Court of Appeals for the Ninth Circuit(App. 1-2). On June 16, 2006, in a unanimous memorandum opinion, the court of appeals affirmed summarily the order denying the petitioner a new trial(App. 2). In the wake of this decision, the petitioner petitioned the court of appeals for a panel rehearing or for a rehearing *en banc*(App. 14). On July 28, 2006, the court of appeals denied the petitioners' petition for a panel rehearing or for rehearing *en banc*(App. 46-47).

The petitioner has now petitioned this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE PETITION

The Decision Below Conflicts With This Court's Decisional Law Which Provides Relief In The Form Of A New Trial When A Defendant Deliberately Refuses In Discovery To Disclose Relevant Evidence Of Liability And Damages Regarding Its Infringement Of Copyrighted Works And Then Destroys This Relevant Evidence So That It Can Never Be Discovered.

Trendwest's Deliberate Refusal to Provide Discovery.

This Court has long recognized that under either Fed. R. Civ. P. 60(b)(3) or its own inherent power to control the conduct of litigation before it, the district court possesses the unquestioned authority—indeed the duty—to relieve a plaintiff from a judgment which was obtained through the fraud, misrepresentation or other misconduct of the defendant as when it refuses to produce relevant documents or things in response to legitimate discovery requests by the plaintiff. *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 244-246(1944). *Toledo Co. v. Computing Co.*, 261 U.S. 399, 421(1923). *Marshall v. Holmes*, 141 U.S. 589, 596;599(1891). *United States v. Throckmorton*, 98 U.S. (8 Otto) 61, 65-66(1878)("Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent,...which show that there has never been a real contest in the trial...of the case, are reasons...to...open the case for a new and fair hearing."). See generally *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44;50(1991) citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34(1812). Compare *Societe Internationale v. Rogers*, 357 U.S. 197,

212(1958)(discovery noncompliance was not wilful or in bad faith).

This "historic power of equity to set aside fraudulently begotten judgments," *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. at 245, does not concern only private parties but is necessary in order to protect the integrity of the courts generally. As this Court observed in *Hazel-Atlas Co.*,

> tampering with the administration of justice in the manner indisputably shown here [i.e., a fabricated article leads to a judgment holding a patent valid and infringed] involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Id. at 246. See also *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580(1946).

The discovery misconduct complained of must be such as prevented a plaintiff such as the petitioner from fully and fairly presenting his case to the jury; it does not require that the information withheld be of such a nature as would alter the result in a case. *Toledo Co. v. Computing Co.*, 261 U.S. at 421;425. In measuring the

effect of misconduct against this standard, the Court in *Hazel-Atlas Co.* candidly conceded that no court can accurately assess the effects of fraudulent conduct. 322 U.S. at 246-247. However, it reasoned that there was no need to make such an assessment where a party's actions themselves in having the fabricated article published, causing a patent to be declared valid and infringed upon appeal, had its intended effect. *Id.* at 247. As the Court concluded, "[t]ruth needs no disguise....[and] the article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of [the defendant], prepared by [its] agents, attorneys, and collaborators."*Id.*

Here Trendwest is likewise in no position to dispute the effectiveness of its fraud and misconduct during discovery upon the ultimate outcome of this litigation. Despite being asked twice by the petitioner to produce all of its video material for the relevant time period so that the petitioner could identify with precision the nature and extent of Trendwest's infringing activity in copying his videotapes, a core issue germane to the issues of both liability and damages, Trendwest deliberately refused to produce the 40-minute loop tape and refused to acknowledge that it had ever used such a tape or that it had ever existed. Moreover, on October 10, 2000, seven months after petitioner's repeated requests in this lawsuit for the production of its loop tapes for 1997 through 2000, Trendwest destroyed all of its loop tapes and take-home tapes(which also contains the loop tape). As in *Hazel-Atlas Co.*, these very acts themselves by Trendwest of concealment and destruction of relevant, discoverable material show that it thought this

evidence material to the case and dispositive of its outcome.

Beyond these inferences permissible under the rationale of *Hazel-Atlas Co.*, the effects of Trendwest's misconduct are patent on this record. Its deliberate subversion of the discovery process and its spoliation of relevant, producible evidence of the loop tapes and the Perspectives tapes: (1) undercut the petitioner's damage claim for indirect profits flowing from Trendwest's use of the loop tapes which were played for all prospective purchasers before they went into the sales room; (2) hindered the petitioner's response to Trendwest's renewed motion for partial summary judgment just before trial on the issue of the petitioner's claim for Trendwest's indirect profits; (3) depressed the petitioner's proof at trial that Trendwest had infringed upon his copyrighted work; (4) negatively affected the jury's calculation of damages flowing from Trendwest's copyright infringement by artificially depressing the instances of infringement for the jury's consideration; (5) undercut Trendwest's anecdotal proof adduced in its motion for partial summary judgment that 2 of its 37 sales facilities in the United States had discontinued the performance and distribution of any infringing videotape footage, i.e., the "podium" and "take home" tapes, without any apparent decrease in sales or increase in the rate of rescission of purchase agreements; and (6) further exposed perjured testimony by Trendwest in its defense of the petitioner's infringement action when it denied the existence of the so-called "Perspectives" tapes, ones used by Trendwest for training its sales staff and ones containing substantial infringing footage belonging to the petitioner.

Thus even though it may have been difficult to appraise accurately the extent to which the jury was affected by Trendwest's incomplete, misleading responses to the petitioner's legitimate discovery requests, when it became known that the jury was presented testimony and proof based on fraudulent, incomplete documentation, and where that evidence was relevant and material to the core issues of liability and damages for Trendwest's copyright infringement, *all* of the jury's factual determinations in this regard, especially its computation of damages, became suspect. See generally *Minneapolis, St. Paul & Sault Ste. Marie Ry Co. v. Moquin*, 283 U.S. 520, 521-522(1931)(litigant who engages in misconduct "will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.").

Truth has no disguise and Trendwest's evasive, misleading and willfully incomplete responses to the petitioner's valid discovery requests cannot be papered over by an assessment that the intentionally undisclosed, destroyed evidence was merely cumulative and redundant. The above cited decisions of this Court belie such a facile assessment. Nor can the "law of the case" analysis employed by the court of appeals to affirm summarily the district judge's ruling survive the fact that the evidence which Trendwest refused to produce was *additional* proof, not merely cumulative evidence, of serial, repeated copyright violations each one of which the jury was entitled to consider in assessing both liability and damages. See *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661, 671(1944).

The Integrity of the Federal Rules of Civil Procedure.

Besides contravening all of this law, the decision below undercuts not only the letter but also the spirit of the rules of civil procedure. The ultimate admissibility of any material sought during discovery is subservient to the principle that any material is discoverable so long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). In this regard, the destroyed loop tape and the Perspectives tape kept from the jury by Trendwest were clearly relevant and material not only to a fair calculation of damages by the jury but also to its determination of Trendwest's liability for copyright infringement in the first place.

This Court has stated that under the Rules of Civil Procedure,

> civil trials in federal courts no longer need be carried out in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial....Proper preparation of a client's case demands that [the attorney for the plaintiff] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

Hickman v. Taylor, 329 U.S. 495, 501;511(1947). As the Court further explained in *United States v. Proctor & Gamble*, 356 U.S. 677, 682(1958), this discovery machinery set up by the Federal Rules of Civil Procedure together with other pretrial procedures,

> make a trial less a game of blindman's bluff and more *a fair contest* with the basic issues and the facts disclosed to the fullest practicable extent.

Id. (emphasis supplied).

None of these interests supporting the integrity of the rules of civil procedure is served by condoning Trendwest's intentional, willful subversion of the discovery process in an effort to contour its liability, undercut the petitioner's legitimate claims for damages and perhaps avoid responsibility for its infringement altogether. Through its misconduct in this case, Trendwest completely sabotaged the federal trial machinery, precluding the "fair contest' which the federal rules are intended to assure. Instead of serving as a vehicle for the ascertainment of truth, the trial in this case accomplished little more than the adjudication of a hypothetical fact situation imposed by Trendwest's selective, self-serving disclosure of information. The policy protecting the finality of judgments is not so broad as to require the protection of judgments obtained in this manner."No fraud is more odious than an attempt to subvert the administration of justice." *Hazel-Atlas, Co.*, 322 U.S. at 251(Roberts, J., concurring). The court of appeals' summary affirmance of the district court's ruling does just that.

Trendwest's Spoliation of Evidence.

Given these principles, *a fortiori* when a defendant destroys, alters or makes unavailable evidence which it knows is relevant to the requested discovery, the sanctions in Rule 60 or as part of the trial court's inherent power are available to provide the petitioner a fair opportunity to have a jury hear the case upon the merits of the relevant proof, especially that evidence which was sought to be destroyed. *Graves v. United States*, 150 U.S. 118, 121(1893). *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925(1st Cir. 1988) (presumption of materiality raised when evidence is destroyed by party obligated to produce it). *In re Holocaust Victim Assets Litig.*, 319 F. Supp. 2d 301(E.D.N.Y. 2004). Moreover, the very fact of spoliation of facially relevant evidence raises the strong presumption that the evidence destroyed would not have helped the party which destroyed it. *Id.*

The Due Process Deprivation.

The petitioner's right to bring a cause of action against Trendwest seeking fair damages based upon all the evidence relevant to the cause is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572(1972). It cannot be taken away without giving him a fair opportunity to be heard at a meaningful time and in a meaningful manner.. *Mathews v. Eldridge*, 424 U.S. 319, 334-335(1976). *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538;541 (1885). It would be reasonable to assume that Fed. R. Civ. P. 1's promise to provide "a just, speedy, and inexpensive determination of every action" would subsume the *Mathews*

description of these fundamental elements of procedural due process. See *Insurance Corp. v. Compagnie Dex Bauxites*, 456 U.S. 694, 705(1982); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322,350(1909).

However, to hold, as the district court and the court of appeals have done, that a party-defendant can deliberately engage in intentionally evasive and obfuscatory discovery—indeed, to commit the spoliation of relevant, material evidence---not only on the issue of damages but also on the crucial issue of liability itself without invoking the right of the aggrieved party-plaintiff to a new trial under Rule 60(b)(3) runs counter to Supreme Court precedent, constitutes a denial of due process and is fundamentally unfair.

Finally, Judge Pechman denied the petitioner's new trial motion concluding that the petitioner's allegations of discovery misconduct by Trendwest "do not amount to clear and convincing proof that [the petitioner] obtained an unfair judgment as a result of [Trendwest's] conduct"(App. 9). There is no justification in this Court's decisional law for imposing such a heightened standard of proof on the petitioner in order to justify the relief of a new trial and both of the courts below denied the petitioner due process of law in doing so.

The Federal Question Concerning The Interpretation of Rule 60(b)(3).

The manner in which the lower courts have interpreted Rule 60(b)(3) in this case in order to avoid

providing the petitioner with a new trial so that Trendwest's liability for these *new, additional* copyright violations which were recently discovered can be considered by a jury is a federal question which rightly invokes the Supreme Court's duty of superintendence of inferior federal courts in order to provide a harmonious, consistent body of law for all federal courts to apply. The ruling below is out of step with the meaning of "misconduct" as used by Rule 60(b)(3), is based upon a plain error of fact about the impact of the newly discovered, undisclosed evidence, and condones or sanitizes Trendwest's conduct in refusing to disclose the existence of and then destroying both the loop tapes and the Perspectives tape.

"A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence [i.e., the facts]." *Cooter & Gell v. Harimarx Corp.*, 496 U.S. 384, 405(1990). The rulings below are each an abuse of discretion because they commit both of these errors.

CONCLUSION

In *Abrahamsen v. Trans-State Exp., Inc.*, 93 F.3d 425, 429(6th Cir. 1996), this observation by the court of appeals is apt:

> Our system of discovery was designed to increase the likelihood that justice will be served in each case, not to promote principles of gamesmanship and deception in which the person who hides the ball most effectively wins

> the case. What happened in this case is a clear example of how bad faith during discovery can lead to further misconduct....[It] show[s] contempt for the rules of discovery and violate[s] the trust placed in counsel to obey the fundamental rules of court. In doing so, counsel Prevented the [petitioner] from fully and fairly presenting [his] case.

Id.

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate the judgment and remand the matter to the district court for a new trial on all of the petitioner's claims of copyright infringement against Trendwest, including those newly emergent claims described by the evidence which Trendwest refused to disclose in discovery; or provide the petitioner with such other relief as is fair and just in the circumstances.

Respectfully Submitted,

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No. 04-35467

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL LYNCH, an individual,
Plaintiff - Appellant,

v.

TRENDWEST RESORTS, INC.,
Defendant - Appellee.

June 9, 2006, Argued and Submitted, Seattle, Washington

June 16, 2006, Filed

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For MICHAEL LYNCH, AN INDIVIDUAL, Plaintiff - Appellant: David L. Garrison, Esq., GARRISON & ASSOCIATES, Seattle, WA; C. Dennis Loomis, Esq., JENKENS & GILCHRIST, LLP, Los Angeles, CA.

For TRENDWEST RESORTS INC, Defendant - Appellee: Jerret E. Sale, Esq., BULLIVANT HOUSER BAILEY, PC, Seattle, WA.

JUDGES: Before: BEEZER, TALLMAN, and BYBEE, Circuit Judges.

OPINION: MEMORANDUM*

Before: BEEZER, TALLMAN, and BYBEE, Circuit Judges.

Appellant Michael Lynch appeals the district court's denial of his motion for relief from judgment and a new trial under Federal Rules of Civil Procedure 60(b)(2), (3) and (6), as well as the district court's denial of his motion for reconsideration. We have jurisdiction under 28 U.S.C. § 1291 and we affirm. The parties are familiar with the facts and procedural history.

The district court did not abuse its discretion in denying the Rule 60(b)(3) motion when it found that the additional evidence proffered was insufficient to reopen the judgment. The law of the case governs the indirect damages claim and we see no reason to disturb it. *See* Lynch v. Trendwest Resorts, Inc., 64 Fed. Appx. 44 (9th Cir. 2003).

The claims under Rules 60(b)(2) and (6) were waived because they were not argued in the opening brief.

Each party shall bear its own costs on appeal.

AFFIRMED.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

No. C00-329P
UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

MICHAEL LYNCH,
Plaintiff,

v.

TRENDWEST RESORTS, INC.,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL

This matter comes before the Court on Plaintiff s Renewed Motion for a New Trial. (Dkt. No. 308). Having considered the pleadings and supporting materials, the Court DENIES Plaintiff's motion. As a threshold matter, the Court rejects Defendant's argument that this motion is untimely because it is a renewal of a motion that was timely. A new trial is not warranted on Plaintiff's claim that he is entitled to additional damages by Defendant's use of his footage on newly discovered tapes because this evidence is not so significant that Plaintiff would likely have obtained a substantially different outcome at trial if this evidence had been presented. Likewise, a new trial on this claim is not warranted due to Defendant's misconduct in not disclosing this evidence because this misconduct did not substantially interfere with Plaintiff's right to fully and fairly prepare for and present his case at trial. Additionally, Plaintiff's new evidence does not warrant a new trial on the issue of indirect profits.

BACKGROUND

Plaintiff Michael Lynch sued Defendant Trendwest Resorts, Inc. for copyright infringement, among other claims. Plaintiff sought to recover the unearned fees from Defendant's infringement, as well as the indirect profits Defendant allegedly earned by its use of Plaintiff's video footage in Defendant's sales and promotional videos. The Court initially denied Defendant's motion for summary judgment on the issue of indirect profits, finding that there was, at a minimum, a temporal connection between the viewing of the podium tape, the purchase, and the receipt of the take-home tape, which precluded summary judgment. (Dkt. No. 103). The Court later granted Defendant's motion for summary judgment on this issue. (Dkt. No. 201). Defendant had put forth evidence that it had not used either the podium tape or the take-home tape in two of its offices and those offices had not experienced a decrease in sales or an increase in rescissions. Plaintiff failed to put forth any evidence to support his theory of indirect profits. The Court granted summary judgment, finding that Plaintiff's claim for indirect profits was speculative and remote in light of the evidence presented.

At the trial on the issue of unearned fees, the jury concluded that Defendant had infringed some of Plaintiff s footage. Plaintiff was awarded a verdict of over $88,000.

After final judgment, Plaintiff appealed the summary judgment on the indirect profits, among other things. While that appeal was pending, Plaintiff filed two motions for relief from judgment based on

newly discovered evidence. (Dkt. Nos. 280, 293). The evidence consisted of loop tapes that allegedly contained Plaintiff s footage and were played continuously in the lobbies of the sales rooms. Plaintiff moved for a new trial on the damages caused by this infringement. He also claimed that Defendant's use of these loop tapes entitled Plaintiff to recover indirect profits earned by that use. There was also new evidence that "perspectives" tapes, which Defendant used internally, contained Plaintiff's footage, despite the fact that Defendant had asserted that these tapes did not contain any of Plaintiff's footage.

The Court struck Plaintiff s two motions, concluding that it lacked jurisdiction because the matter was on appeal. (Dkt. No. 301). The Court indicated that it would consider the motions only on remand from the Court of Appeals. Plaintiff moved the appellate court to supplement the record to include this newly discovered evidence. In his motion to supplement the record, Plaintiff argued that this evidence would have precluded summary judgment. (Merrick Dec., Ex. B). The Ninth Circuit denied Plaintiff s motion to supplement the record without comment. (Id., Ex. C. In a separate ruling, it affirmed this Court's summary judgment order on indirect profits. Lynch v. Trendwest Resorts, Inc., 64 Fed. Appx. 44 (9th Cir. 2003) (unpublished) (attached as Ex. D to Merrick Dec.). The Ninth Circuit's mandate was issued May 16, 2003.

ANALYSIS

Plaintiff now moves for a new trial on two issues: 1) damages caused by the infringement in the loop tapes and the perspectives tapes, and 2) his entitlement

to indirect profits earned by Defendant. Plaintiff brings this motion pursuant to Fed. R. Civ. P. 60(b)(2) (newly discovered evidence), 60(b)(3) (Defendant's alleged misconduct in not producing this evidence in discovery), and alternatively 60(b)(6) (other reasons justifying relief from the operation of the judgment).

I. Timeliness of Plaintiff s Motion

Motions under Rule 60(b)(2) and (3) must be brought within one year of entry of the judgment at issue. Lyon v. Agusta S.P.A., 252 F.3d 1078, 1088 (9th Cir. 2001). While more than one year has passed since entry of judgment in this case, the Court will not deem Plaintiff's motion untimely. The Court struck the motion in light of the pending appeal, stating that the Court would consider the motion only on remand from the Court of Appeals. Therefore, while the general rule is that a pending appeal does not stop the clock for Rule 60(b)(2) and (3) purposes and the Court may deny such motions notwithstanding a pending appeal, in this instance, the Court chose not to deny Plaintiff's motion, but merely to strike it. As such, it is properly considered a renewal of a motion that was timely.

II. Plaintiff s Claim For Fees For Defendant's

Use of His Footage in Loop Tapes and Perspective Tapes

Plaintiff asserts that he learned through a related case filed by an associate David M. Kalber, Kalber v. Trendwest, et al., C01-1548Z, that Defendant's loop tapes contained his footage and that Defendant used these loop tapes in its sales offices.

He claims also to have learned that the perspectives tapes contained Plaintiff's footage when Defendant produced these tapes in the Kalber case. He asserts that he was denied the opportunity to present this evidence to the jury, and thereby was denied the potential damages the jury might have awarded him for these instances of infringement.

A. Rule 60(b)(2) - Newly Discovered Evidence

Under Rule 60(b)(2), relief from judgment may be warranted if there is newly discovered evidence that, by due diligence, could not have been discovered in time to move for a new trial under Rule 59(b). Additionally, the moving party must show that the newly discovered evidence "is of such magnitude that production of its earlier use would have been likely to change the disposition of the case." Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003) (quotations and citation omitted).

Even if the loop and perspectives tapes containing Plaintiff's footage are considered newly discovered, it is not evidence of such magnitude that its introduction at trial would have changed the disposition of the case in a way that merits a new trial. Plaintiff contends that, although he prevailed at trial on the question of infringement in Defendant's podium and take-home tapes, the question of infringement in the loop and perspectives tapes was never presented to the jury. Therefore, he never had the opportunity to present evidence of this particular instance of infringement. Plaintiff does not contest Defendant's assertion that the footage on the loop and perspectives tapes was identical to the footage on the take home

tape. Plaintiff also does not contest Defendant's assertion that it produced 20 to 40 loop tapes and 45 perspectives tapes. Damages were calculated based on "lost duplication rights" rather than the cost to license the footage. At trial, Plaintiff asserted that his net profit per tape was $3.50. Therefore, the only additional damages Plaintiff may have obtained was approximately $300 (i.e. 85 tapes multiplied by $3.50). Given the fact that Plaintiff sought more damages at trial than the jury awarded him, combined with the relative small amount of $300 compared to the $88,000 he was awarded at trial, this Court is not persuaded that the use of this evidence at trial would have been significant enough to have likely resulted in a different outcome for Plaintiff. Therefore, a new trial is not warranted under Rule 60(b)(2).

B. Rule 60(b)(3) - Misconduct

Under Rule 60(b)(3), relief from a judgment may be obtained if the moving party proves by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct, which prevented the moving party from fully and fairly presenting his case. De Saracho v. Custom Food Mach., Inc., 206 F.3d 874, 880 (9th Cir. 2000). "It is aimed at judgments that were unfairly obtained, not at those which are factually incorrect." Id. (quotations and citation omitted). While it is true that misconduct covers even accidental omissions, not every instance of nondisclosure merits granting a new trial. Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1St Cir. 1988). Rule 60(b)(3) must be viewed in light of the principle that verdicts should not be disturbed lightly. To warrant relief from a judgment, the misconduct

must have substantially interfered with the moving party's ability to fully and fairly prepare for and proceed at trial. Id. at 924. For instance, if the evidence that was not disclosed would be cumulative, insignificant, or of marginal relevance, a new trial is likely not warranted. Id. Moreover, if the misconduct appears to have been intentional, giving rise to a presumption of substantial interference, this presumption may be refuted by clear and convincing evidence that the withheld material was in fact inconsequential. Id. at 925. Specifically, the court noted that "even when documents have been destroyed, it is possible to present evidence of their general nature and contents, and to decide whether they would likely have been irrelevant or cumulative." Id. at 926.

Plaintiff's allegations of discovery misconduct by Defendant do not amount to clear and convincing proof that Plaintiff obtained an unfair judgment as a result of Defendant's conduct. Reviewing all of the evidence presented by both sides, it does not appear that Defendant's conduct during discovery amounted to misconduct that would warrant a new trial. The footage on the loop and perspectives tapes was the same footage on the take-home tapes that Plaintiff presented to the jury. Given this fact combined with the fact that Plaintiff recovered over $88,000, but had actually sought more, the loop and perspectives tapes would likely have been cumulative and of marginal relevance to the damages Plaintiff sought at trial. As such, the Court does not conclude that Defendant's misconduct in not disclosing this material substantially interfered with Plaintiff's right to fully and fairly prepare for and present his case at trial.

B. Rule 60(b)(6) - Other Reason Justifying Relief From a Judgment

Rule 60(b)(6) permits relief from a judgment for "any other reason" justifying relief. The Ninth Circuit has interpreted this to mean that the reason proffered must be different from the other basis provided for in Rule 60(b), such as newly discovered evidence or misconduct. Lyon v. Agusta S.P.A., 252 F.3d 1078,1088-89 (9th Cir. 2001). Here, the only basis for Plaintiff's motion is newly discovered evidence and Defendant's alleged misconduct. Because Plaintiff offers no other reason that would fall under Rule 60(b)(6), a new trial is not warranted under this subsection.

III. Plaintiff's Claimed Entitlement to Defendant's Indirect Profits

Plaintiff argues that the Court's summary judgment on indirect profits is erroneous because new evidence shows that Defendant used Plaintiff's footage in the sales offices that Defendant earlier claimed it had not. However, the evidence that Plaintiff presents to does not persuade the Court that the summary judgment order was wrong.

As newly discovered evidence Plaintiff points to statements made by Lawrence Bowen in a deposition taken February 23, 2003. (Hayton Dec., Ex. A). Plaintiff has not explained who Mr. Bowen is. It appears from the deposition excerpts presented that he is a consultant that Defendant hired to assess the effectiveness of Defendant's sales practices. He stated that he attended a sales presented in September, 2001 in Defendant's Lynwwood office, during which a video

was shown (i.e. a podium tape). (Id. at 40-41). He also stated that he was aware of the fact that Defendant sent a take-home tape with people after they purchased Defendant's product and that he was given a takehome packet when he visited the Lynwwood office (presumably this packet included a take-home tape). (Id. at 82).

Defendants relied on three declarations as evidence to support its motion on this issue, none of which is undermined by Plaintiff's newly discovered evidence. First, Ronald A. Buzard, senior vicepresident of sales for Defendant, testified that the podium tapes were not used in the new wolf Creek, Utah office for several months and that sales in that office were as high or higher than other new offices using the podium tape. (Buzard Dec., Par. 2 - Dkt. No. 160). Plaintiff's evidence regarding the podium tape is limited to the Lynwood office as of September, 2001. This evidence does not contradict Defendant's evidence that the tape was not used in a Utah office. Defendant does not appear to have ever claimed that the Lynwood office did not use the podium tape.

Second, David Hedeen, a sales representative in Defendant's Lynwwood office, stated that from at least June, 1998 through early 2001, the Lynwwood office did not distribute the take-home tape and the rescission rates during that time were as low or lower than when the tape had been distributed. (Hedeen Dec., Par. 2 - Dkt. No. 161). He also stated that the Lynwwood office began distributing them again sometime in early to mid 2001, during which time rescission rates increased. (Id., Par. 3). Plaintiff's evidence does not contradict Defendant's evidence. Mr. Bowen stated that he saw

the take-home tape being distributed at the Lynwwood office in September, 2001. Rather than contradicting Mr. Hedeen's statement, it actually corroborates his statement that the office began distributing the tape again in early to mid 2001.

Third, Paul Setphun, an accountant hired by Defendant, stated that he analyzed rescission rate data for all offices compared with the Lynnwood office from 1995 through 2000, and concluded that rescission rates at the Lynnwood office decreased over that time, inferring that the take-home tape had no impact on rescission rates. (Setphun Dec, Pars. 2-3 - Dkt. No. 159). Again, Plaintiff's evidence does not contradict Defendant's evidence. Mr. Setphun's analysis did not cover September, 2001 when Mr. Bowen saw the take-home tape being distributed.

Plaintiff also presents evidence that the loop tapes containing his footage were used in Defendant's sales offices, and that this entitles him to indirect profits. Mr. Bowen stated that Defendant has used a loop tape in its showrooms. (Hayton Dec., Ex. A at 60). He does not state the dates during which this occurred. Additionally, Plaintiff points to a document in which Trendwest officer Dan Stearns, during a deposition, marked the sales offices that used loop tapes. (Hayton Dec., Ex. B).[1] However, Plaintiff has not presented any evidence that the loop tapes had an effect on sales. It's mere use is insufficient evidence to prove this fact or even rebut Defendant's evidence that the podium and take-home tapes did not effect sales. Given the evidence that the podium and take-home tapes did not effect sales and the fact that the loop tapes contained the same footage, Plaintiff's evidence that the loop tapes

were used in sales' offices does not make Plaintiff's claim to indirect profits any less speculative than when the Court considered this issue on summary judgment. Therefore, the Court concludes that this evidence does not warrant a re-opening this case to litigate this issue anew.

CONCLUSION

The Court DENIES Plaintiff's Motion for a New Trial. A new trial is not warranted on Plaintiff's claim that he is entitled to additional damages by Defendant's use of his footage on newly discovered tapes because this evidence is not so significant that Plaintiff would likely have obtained a substantially different outcome at trial if this evidence had been presented. Likewise, it is not warranted due to Defendant's misconduct in not disclosing this evidence because this misconduct did not substantially interfere with Plaintiff's right to fully and fairly prepare for and present his case at trial. Additionally, Plaintiff's new evidence does not warrant a new trial on the issue of indirect profits.

Dated: April 30, 2004

Marsha J. Pechman
United States District Judge

Footnote

[1] This document presents admissibility problems. It is not clear from the documents Plaintiff attached here that this document is what Plaintiff purports it to be.

Filed 7/28/06
No. 04-35467
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL LYNCH, an individual,
Plaintiff - Appellant,

v.

TRENDWEST RESORTS, INC.,
Defendant - Appellee.

JUDGES: Before: BEEZER, TALLMAN, and BYBEE, Circuit Judges.

ORDER

The panel has voted to deny the petition for panel rehearing. Judges Tallman and Bybee have voted to deny the petition for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.